No. 93-144

In The

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,

Petitioner,

vs.

KURTH RANCH; KURTH HALLEY CATTLE COMPANY; RICHARD M. and JUDITH KURTH, husband and wife; DOUGLAS M. and RHONDA I. KURTH, husband and wife; CLAYTON H. and CINDY K. HALLEY, husband and wife; ROBERT G. DRUMMOND, TRUSTEE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In direct conflict with a prior decision of the Montana Supreme Court, the court of appeals held that a tax assessment under the Montana Dangerous Drug Tax violated the double jeopardy provisions of the United States Constitution.

The question presented is:

Can assessment of a state tax on the possession and storage of dangerous drugs, imposed separate and apart from any criminal penalty, violate the double jeopardy prohibitions of the Fifth and Fourteenth Amendments to the United States Constitution?

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In response to the brief in opposition to the petition for writ of certiorari by the Respondents, Kurth Ranch, et al., ("Taxpayers"), the Petitioner, the Montana Department of Revenue ("DOR"), submits the following reply brief.

ARGUMENT

The Taxpayers' argument illustrates the nature of the conflict between the decision of court of appeals and the decision of the Montana Supreme Court in *Sorenson v. State Dep't of Revenue*, 836 P.2d 29 (Mont. 1992). In the Taxpayers' brief the Montana Drug Tax effortlessly goes from a tax to a "civil sanction" and a "punishment" without ever justifying the critical leap from tax to civil sanction. A similar unexplained metamorphosis occurred in the Court of Appeals' decision below.

A. The Montana Supreme Court Clearly Held the Montana Drug Tax Was Not a Civil Sanction – the Ninth Circuit Held It Was a Civil Sanction.

The Taxpayers argue that the Montana Supreme Court in the *Sorenson* case did not understand this Court's decision in *United States v. Halper*, 490 U.S. 435 (1989). They assert, the Montana Court did not realize that this Court's decision applied to "civil sanctions" and not just criminal punishment. That argument fails. The Montana Supreme Court in *Sorenson* stated the issue as follows:

> Next the Drug Tax may violate double jeopardy if it is an *excessive civil sanction*. *United*

> *States v. Halper* (1989), 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487. In *Halper*, the Court stated that *civil as well as criminal sanctions may constitute punishment and violate double jeopardy when the sanction, as applied to the individual, serves the goal of punishment* rather than the remedial purpose of compensating the government for its loss. *Halper* at 448, . . .
>
> The DOR contends that double jeopardy does not attach to Montana's Drug Tax because the tax is an excise tax for raising revenue, not a criminal penalty or civil sanction . . . (Emphasis supplied.)

836 P.2d at 30.

The Montana Supreme Court clearly understood that *Halper* applied to both criminal and civil sanctions and rejected the argument that the Montana Drug Tax was a civil sanction of any nature.

B. Taxes, Including the Montana Drug Tax, Are Not Civil Sanctions.

This Court has defined "taxes" as "those pecuniary burdens laid upon individuals or their property, regardless of their consent, for the purpose of defraying the expenses of government or of the undertakings authorized by it." *New York v. Feiring*, 313 U.S. 283, 285 (1941).

It has never been necessary to validate a tax by showing either the "damages" caused by the taxpayer or the burden the taxpayer placed on government or society because this Court has repeatedly held:

> [T]here is no requirement . . . the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity. . . . A *tax is not an assessment of benefits. It is*, as we have said, *a means of distributing the burden of the cost of government*. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. (Emphasis supplied.)

Commonwealth Edison Co. v. Montana, 453 U.S. 609, 623 (1981).

The Montana Supreme Court found the "intention of the Montana Legislature [when enacting the drug tax was] to enact a revenue producing tax on drugs is clear." 836 P.2d at 31. Relying on *Commonwealth Edison* the Montana Supreme Court held: "unlike the civil sanctions in *Halper* where such proof may be required, a tax requires no proof of remedial costs on the part of the state." 836 P.2d at 33.

This Court's latest analysis of the term "sanction" is found in *United States Dept. of Energy v. Ohio*, 112 S. Ct. 1627 (1992). In that decision, this Court equated "civil sanctions" to "coercive" and "punitive fines."

Taxes, including the Montana Drug Tax, are simply not civil sanctions. The lower federal courts erred when they held that a tax was a civil sanction.

C. *Austin* Does Not Address the Issue Raised in This Petition.

The Taxpayers rely upon this Court's recent decision in *Austin v. United States*, 61 U.S.L.W. 4811 (U.S. June 28, 1993) to argue that the petition need not be granted. However, *Austin* does little to resolve the basic conflict between the decision of the Court of Appeals and the decision of the Montana Supreme Court in *Sorenson* over whether the Montana Drug Tax is a tax or a civil sanction.

In *Austin* the issue was whether forfeitures under 21 U.S.C. §§ 881(a)(4) and (a)(7) were fines within the meaning of the Eighth Amendment's Excessive Fines Clause. There was no question that the statute imposed a forfeiture since it states: "The following shall be subject to forfeiture to the United States . . .." 21 U.S.C. § 881(a). This Court found that a forfeiture was a fine under the Eighth Amendment after an analysis of what "forfeitures" were at the common law.

On pages 8 and 9 of their brief in opposition, the Taxpayers quoted footnote 6 in the *Austin* case out of context. That footnote was to this sentence of the decision:

> Thus, the question is not, as the United States would have it, whether forfeiture under §§ 881(a)(4) and (a)(7) is civil or criminal, but rather whether it is punishment.

Austin, 61 U.S.L.W. at 4813.

More importantly the Taxpayers omitted the final sentence of footnote 6: "Since in this case we deal only with the question whether the Eighth Amendment's

Excessive Fines Clause applies, we need not address the application of those [*Kennedy v. Mendoza-Martinez* and *Ward*] tests." 61 U.S.L.W. at 4813, n. 6. Therefore, *Austin* and *Halper* do not address the central issue in this case of what is and what is not a "civil sanction" under the double jeopardy clause of the Fifth Amendment.

The Montana Supreme Court in *Sorenson* was correct, and the Court of Appeals was wrong, under the standards set out by this Court. The Montana Drug Tax is not a civil sanction.

D. The Respondent Misinterpreted Decisions in Other State Courts and This Court's Decision in *Sanchez* – Those Courts Held Drug Taxes Were Taxes and Not Penalties.

The Taxpayers misread many of the decisions by appellate courts in other states. For example, in *Rehg v. Illinois*, 605 N.E.2d 525 (Ill. 1992), the Illinois Supreme Court upheld a tax on drugs of $42,000. It remanded the case back to the lower court for a hearing on the statutory 400% penalty ($168,000) imposed for failing to pay the drug tax. No part of the Montana tax assessment at issue in this case is a penalty.

The amicus brief submitted by the States of Kansas, Colorado, Georgia, Idaho, Minnesota, Nebraska, and Texas discusses the state court decisions that, contrary to Taxpayers' argument, conflict with the circuit court's decision. Similarly, the Taxpayers' analysis of many of the federal cases also is incorrect.

The Taxpayers' argument that this Court's decision in *United States v. Sanchez,* 340 U.S. 42 (1950), supports the decision of the circuit court is refuted by the history of that case which is shown in the briefs filed by the United States Solicitor General. As the Solicitor General's briefs showed a central question in *Sanchez* was whether a tax of $100 per ounce on marijuana was a tax or a punishment.[1] Subsequent federal court decisions cited in the petition for certiorari in this case specifically recognized that *Sanchez* held that a tax on marijuana was a true tax and not a penalty.[2]

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[1] The Solicitor General's statement of the case was:

> On February 21, 1949, the United States brought this suit in the District Court for the Northern District of Illinois to collect taxes of $8,701.65, assessed against appellees on February 27, 1943, under Section 2590 (a)(2) of the Internal Revenue Code, upon the transfers of marihuana made by them. (R. 1.) Appellees' answers denied on various grounds that they were liable for such taxes. (R. 2-3.) At the opening of the trial on March 28, 1950, appellees, relying on *Tovar v. Jarecki,* 173 F.2d 449, in which the Court of Appeals for the Seventh Circuit had held Section 2590 (a)(2) to be "a penal and not a revenue-raising statute * * * a penalty inflicted without a hearing and not a tax", moved to dismiss the complaint (R. 6). The district court, apparently regarding the *Tovar* case as an authoritative holding that Section 2590(a)(2) is unconstitutional, granted the motion (R. 6), and an order was entered dismissing the complaint. (R. 3.).

Brief for United States, *United States v. Sanchez,* Cause No. 81, October Term, 1950 p. 2-3.

[2] The Taxpayers also rely upon cases overruled by *Sanchez.* For example, they continue to rely on *Tovar v. Jarecki,* 173 F.2d 449 (7th Cir. 1949), despite at least one federal court decision which recognized that *Sanchez* overruled *Tovar*:

CONCLUSION

No amount of argument can hide the unequivocal conflict between the *Sorenson* decision and the decision of the Court of Appeals in this case. The two decisions are irreconcilable. Both courts were fully aware of the decisions of the other court when they made their respective decisions; there is little hope that these two courts will resolve this conflict on their own.

This Court's rules recognize the responsibility for resolving conflicts between the courts of concurrent jurisdictions over the meaning of the United States

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> Plaintiffs cite the case of *Tovar v. Jarecki,* 173 F.2d 449, from the Court of Appeals for the Seventh Circuit. In his opinion in that case, Judge Sherman Minton reversed an order of the district court dismissing a complaint wherein the collection of a tax on marihuana was sought to be enjoined on the grounds . . . that the alleged tax was not indeed a tax but a penalty. . . . ***The holding in this case was subsequently overruled by the Supreme Court in the case of United States v. Sanchez,*** 340 U.S. 42, 71 S.Ct. 108, 95 L.Ed 47 (emphasis supplied).

Lassoff v. Gray, 168 F. Supp. 363, 366 (W.D. Ky., 1958).

Constitution. The Court should exercise its power and *GRANT* the petition to resolve this conflict.

Respectfully submitted,

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